LIBRARY
SUPREME COURT, U. S.

FILED
FEB 15 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 73-1261

Term, 197

MARY ALBRIGHT, Administratrix of the Estate of CHARLES ALBRIGHT, Deceased,

Petitioner,

vs.

R. J. REYNOLDS TOBACCO COMPANY.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

KENNETH W. BEHREND,
MARK B. ARONSON,
BEHREND AND ARONSON,

Attorneys for Petitioner.

1502 Frick Building,
Pittsburgh, Pennsylvania,
15219.

BATAVIA TIMES, APPELLATE COURT PRINTERS
EDWARD W. SHANNON---SR. REPRESENTATIVE
HAROLD L. BERKOBEN---REPRESENTATIVE
1701 PARKLINE DR., PITTSBURGH, PA. 15227
412-881-7463

INDEX.

PAGE

Reference to Reports of Opinions Delivered in the Courts Below 1

Jurisdiction 2

Questions Presented 3

Statutory Provision Involved 3

Statement of the Case 4

Petitioner's Argument for Allowance of the Writ ... 5

Suggestion of Death 9

Motion for Substitution of Party and Amendment of Caption 9

Order of Court 10

Appendix:

Memorandum Order A-1

Judgment Order A-4

Order A-6

Sur Petition for Rehearing A-8

Table of Cases.

Acuff v. Vinsant, 443 S. W. 2d 669 (1969 Tenn.) 7

Allbritton v. Sunray Oil Corp. (1949, DC Tex) 88 F Supp 54 6

Bergin v. Ormsby (1955) 131 Cal App 2d 505, 281 P2d 70 7

Bocchi v. Karnstedt (1953) 238 Minn 237, 56 NW2d 628 7

Brough v. Strathman and Supply Co., 358 F. 2d 374 (1966) 6

Bunton v. Illinois Central R. Co. (1957) 15 Ill App 2d 311, 146 NE2d 205 7

Buffington v. State (1956, Misc) 152 NYS 2d 716 7

PAGE

Canale v. Jones (1956) 288 Miss 317, 87 So 2d 694 7
Carroll v. Lanza (DC Ark. 1953) 116 F. Supp. 491 7
Cronenberg v. United States (DC NC, 1954) 123 F. Supp 693 7
Donahoo v. Illinois Terminal R. Co. (1957) Mo. , 300 SW2d 461 7
Duvall v. T. W. A. (1950) 98 Cal App 2d 106, 219 P2d 463 6
Evans v. Patterson (1959) 269 Ala 250, 112 So 2d 194 . 7
Flemming v. Thorson (1950) 231 Minn 343, 43 NW2d 225 7
Gallegher v. Sears Roebuck & Co. (1959) 8 App Div 2d 729, 187 NYS2d 102 7
Garippa v. Wisotsky (Sup. 1951) 108 NYS 2d 67 7
Grober v. Capital Transit Co. (DC 1954) 119 F. Supp 100 7
Hansman v. Western Union Telegraph Co. *et al.*, 174 N.W. 434 (1919, Minn.) 7
Hayes v. State (1957) 6 Misc 2d 617, 167 NYS2d 566 .. 7
Ignatyuk v. Tramp Chartering Corp. (DC NY, 1955) 133 F. Supp 854 7
Jackson v. Reed (1958) 233 Miss 180, 102 So 2d 342 .. 6
Jenkins v. Fandal, 242 F. Supp. 528 (1965) 6
Kings Indian Billiard Co. v. Winters (1952) 123 Ind App 110, 106 NE2d 713 7
Leming v. Oil Fields Trucking Co. (1955) 44 Cal 2d 343, P2d 23 6
McAlester Corp. v. Wheeler (1951) 205 Okla 446, 239 P2d 409 7
Miller v. McCoy Truck Lines, Inc. (1952) 243 Iowa 483, 52 NW2d 62 7
Minyard v. Woodward Iron Co., 81 F. Supp. 414 (1948) 7
Missouri, P. R. Co. v. Diffee (1947) 212 Ark 55, 205 SW2d 458 7
Morris v. Gimbel Brothers, Inc., United States District Court, E. D. Penna. 246 F. Supp. 984 (1965) 7
Newton v. Barnett (1959) 146 Conn 344, 150 A2d 821 .. 7
Palmer v. Moren, U. S. District Court, M. D. Penna. 44 F. Supp. 704 (1942) 7

PAGE

S. W. R. Co. v. Duffy (1957, Tex Civ App) 308 SW2d 202 7
St. Louis, S. F. R. Co. v. Perryman (1948) 213 Ark 550, 211 SW2d 647 7
Salkoff v. Dissik, U. S. District Court, E. D. Penna. 189 F. Supp. 314 (1960) 7
Southland Broadcasting Co. v. Tracy (1951) 210 Miss. 836, 50 So 2d 572 7
Western & A. R. Co. v. Burnett (1949) 79 Ga App. 530, 54 SE2d 357 7

STATUTE.

28 U. S. C.:
Section 1332 ..... 2, 3, 4, 5
Section 1254 (1) 2

IN THE

Supreme Court of the United States

No.

Term, 197

MARY ALBRIGHT, Administratrix of the Estate of CHARLES ALBRIGHT, Deceased,

Petitioner,

vs.

R. J. REYNOLDS TOBACCO COMPANY.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Your Petitioner prays that your Honorable Court issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled civil action October 25, 1973, and amended November 23, 1973.

Reference to Reports of Opinions Delivered in the Courts Below

The Memorandum Order entered by Judge Adams of the United States Court of Appeals for the Third Circuit, dated January 18, 1974, and not yet recorded, is reprinted in the

Appendix hereto, Pgs. A-1–A-3, *infra*. The Judgment Order entered October 25, 1973 by Judge Adams, after a review of the Briefs and record, but without argument, is reprinted in the Appendix hereto, Pgs. A-4, A-5, *infra*. This Judgment Order was modified by Judge Adams on November 23, 1973, and is reprinted in the Appendix hereto, Pgs. A-6, A-7, *infra*. The Order entered by Judge Adams November 30, 1973, denying Petition for Rehearing is reprinted in the Appendix hereto, Pgs. A-8, A-9, *infra*. The opinion of Judge Weber of the United States District Court for the Western District of Pennsylvania dated October 23, 1972, is included in the Appendix to the Appeal to the United States Court of Appeals for the Third Circuit which is being certified to this Court.

Jurisdiction

Charles Albright, during his lifetime, instituted this civil action in the United States District Court for the Western District of Pennsylvania. Jurisdiction was based upon 28 U. S. C. § 1332—Diversity of Citizenship and Jurisdictional Amount. Upon dismissal of the Complaint, an appeal was taken to the United States Court of Appeals for the Third Circuit which after modified opinions affirmed dismissal of the Complaint solely "on the grounds that Appellant's claim fails to comply with the jurisdictional amount requirement of 28 U. S. C. § 1332." (See Memorandum Order dated January 18, 1974, reprinted in the Appendix, *infra*.) The jurisdiction of the Supreme Court of the United States is invoked under 28 U. S. C. § 1254 (1).

Questions Presented

1. Can a claim for the inducement of cancer and for the loss of a lung removed surgically in two parts during two operations with attendant pain and suffering, removal of ribs, fear of dying, fear of surgery and mental anguish as a matter of law said to be not worth in excess of the sum of ten thousand ($10,000.00) dollars exclusive of interest and costs; and is it not arbitrary and capricious to exclude from pain and suffering the foregoing elements?

2. What is the test by which a trial Court may determine whether jurisdictional amount has been met?

3. Was that test applied to this claim?

4. Should the Federal Court remand to the State Court claims dismissed for lack of jurisdictional amount?

Statutory Provision Involved

§ 1332. DIVERSITY OF CITIZENSHIP; AMOUNT IN CONTROVERSY; COSTS

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State, and foreign states or citizens or subjects thereof; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

Statement of the Case

Charles Albright brought this suit during his lifetime for injuries and damages he sustained from consumption of cigarettes manufactured and sold by Defendant. He died while this claim was pending and his wife, the Administratrix of his Estate, was substituted as Party Plaintiff. Prior to trial, the Defense moved for Summary Judgment alleging, in effect, a prior satisfaction, and lack of jurisdictional amount. The trial Court granted this motion in both parts and Plaintiff appealed. The United States Court of Appeals for the Third Circuit rejected Defendant's prior satisfaction argument, but affirmed dismissal of the Complaint for failure to comply with the jurisdictional amount requirement of 28 U. S. C. § 1332. Mary Albright died November 17, 1973, and on January 31, 1974, Charles M. Albright was appointed Administrator D.B.N. of the Estate of Charles Albright. A Suggestion of Death and Motion for Substitution is set forth at the end of this Petition.

While a protective writ had been filed on behalf of Charles Albright against R. J. Reynolds Tobacco Company in the State Court, a period of eight years elapsed from the time this action was initially filed. It was presumed throughout the duration of litigation that the jurisdictional amount requirement had been met. At the present time, this claim has been dismissed by the Federal Court, and no forum exists which will hear this claim.

Petitioner's Argument for Allowance of the Writ

The Supreme Court of the United States should determine whether a Federal Trial Court should remand to a State Court a claim dismissed for lack of jurisdictional amount. The Supreme Court of the United States should determine whether the State Court must accept such a claim from the Federal Court.

The Supreme Court of the United States should prescribe the test to be used by the trial Court in determining whether the jurisdictional amount requirement of 28 U. S. C. § 1332 has been met.

The Supreme Court of the United States should issue a Writ of Certiorari to the United States Court of Appeals for the Third Circuit because that Appellate Court has rendered a decision which affects the evaluation of all personal injury claims filed in Federal Courts. The Appellate Court, in a *per curiam* opinion, affirmed dismissal of the Complaint for lack of jurisdictional amount. The Parties do not know what, if any test, the Appellate Court used to reach that conclusion. Appellant can only conclude that the following elements were arbitrarily excluded from pain and suffering:

1. Inducement of lung cancer;
2. Two surgical operations removing ribs and lung in two sections;
3. Loss of a lung;
4. Loss of ribs;
5. Fear of dying from operation or cancer;
6. Fear of surgery; and
7. Mental anguish.

Charles Albright, at the time he filed this claim, suffered from various disabilities, not all of which were charged to the Defendant in the Complaint. The trial Judge penalized Plaintiff's Decedent by ruling that the loss of the lung during two operations with attendant pain and suffering, removal of ribs, fear of dying, fear of surgery and mental anguish as a matter of law could not be worth in excess of ten thousand ($10,000.00) dollars, exclusive of interest and costs solely because Charles Albright was burdened by other ailments. If Charles Albright did not have any ailments other than those alleged in the Complaint, and if Charles Albright had not asserted a claim for medical expenses or lost wages, his claim solely for the loss of a lung during two operations with attendant pain and suffering, removal of ribs, fear of dying, fear of surgery and mental anguish as a matter of law would alone be worth in excess of ten thousand ($10,000.00) dollars exclusive of interest and costs.

The trial Judge denied Plaintiff due process in failing to apply to this claim the test used to evaluate damages, which the same trial Judge so properly described in another claim, *Jenkins v. Fandal*, 242 F. Supp. 528 (1965).

The Supreme Court of the United States should issue a Writ of Certiorari to the United States Court of Appeals for the Third Circuit because the *Per Curiam* Opinion of the Appellate Court affirming dismissal for lack of jurisdictional amount, is contrary to, and directly opposite to numerous decisions of other Appellate and Trial Courts, of which the following are only a small selection: Brough v. Strathman and Supply Co., 358 F. 2d 374 (1966); Leming v. Oil Fields Trucking Co. (1955) 44 Cal 2d 343, P2d 23; Allbritton v. Sunray Oil Corp. (1949, DC Tex) 88 F Supp 54; Duvall v. T. W. A. (1950) 98 Cal App 2d 106, 219 P2d 463; Jackson v. Reed (1958) 233 Miss 180, 102 So 2d 342,

Western & A. R. Co. v. Burnett (1949) 79 Ga App 530, 54 SE2d 357; Kings Indian Billiard Co. v. Winters (1952) 123 Ind App 110, 106 NE2d 713; Newton v. Barnett (1959) 146 Conn 344, 150 A2d 821; Gallegher v. Sears, Roebuck & Co. (1959) 8 App Div 2d 729, 187 NYS2d 102; S. W. R. Co. v. Duffy (1957, Tex Civ App) 308 SW2d 202; Donahoo v. Illinois Terminal R. Co. (1957) ___ Mo ___, 300 SW2d 461; Bunton v. Illinois Central R. Co. (1957) 15 Ill App 2d 311, 146 NE2d 205; Bocchi v. Karnstedt (1953) 238 Minn 237, 56 NW2d 628; Grober v. Capital Transit Co. (DC 1954) 119 F. Supp 100; Bergin v. Ormsby (1955) 131 Cal App 2d 505, 281 P2d 70; Canale v. Jones (1956) 288 Miss 317, 87 So 2d 694; McAlester Corp. v. Wheeler (1951) 205 Okla 446, 239 P2d 409; Evans v. Patterson (1959) 269 Ala 250, 112 So 2d 194; Southland Broadcasting Co. v. Tracy (1951) 210 Miss. 836, 50 So 2d 572; Flemming v. Thorson (1950) 231 Minn 343, 43 NW2d 225; Miller v. McCoy Truck Lines, Inc. (1952) 243 Iowa 483, 52 NW2d 62; Missouri, P. R. Co. v. Diffee (1947) 212 Ark 55, 205 SW2d 458; St. Louis, S. F. R. Co. v. Perryman (1948) 213 Ark 550, 211 SW2d 647; Garippa v. Wisotsky (Sup. 1951) 108 NYS 2d 67; Cronenberg v. United States (DC NC, 1954) 123 F. Supp 693; Ignatyuk v. Tramp Chartering Corp. (DC NY, 1955)133 F. Supp 854; Buffington v. State (1956, Misc) 152 NYS 2d 716; Hayes v. State (1957) 6 Misc 2d 617, 167 NYS2d 566; Carroll v. Lanza (DC Ark, 1953) 116 F. Supp. 491; Minyard v. Woodward Iron Co., 81 F. Supp. 414 (1948); Hansman v. Western Union Telegraph Co. *et al.*, 174 N.W. 434 (1919, Minn.); Acuff v. Vinsant, 443 S. W. 2d 669 (1969 Tenn.); Morris v. Gimbel Brothers, Inc., United States District Court, E. D. Penna. 246 F. Supp. 984 (1965); Salkoff v. Dissik, U. S. District Court, E. D. Penna. 189 F. Supp. 314 (1960); Palmer v. Moren, U. S. District Court, M. D. Penna. 44 F. Supp. 704 (1942).

If, in a diversity action, the test for determining whether jurisdictional amount has been met turns not on the probability or improbability that the Claimant would get a verdict in a jurisdictional amount in excess of ten thousand ($10,000.00) dollars, exclusive of interest and costs, but upon whether there is a certainty that the Claimant could not get such a verdict and that the Claimant would not be permitted to keep such a verdict if it were awarded, this claim has certainly met this test. Claimant here is entitled to keep a verdict in excess of $10,000.00 exclusive of interest and costs.

For all of these reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

KENNETH W. BEHREND,
MARK B. ARONSON,
1502 Frick Building,
Pittsburgh, Pennsylvania 15219,

Attorneys for Petitioner.

Suggestion of Death

AND NOW, come KENNETH W. BEHREND and MARK B. ARONSON and suggest of record to Your Honorable Court that MARY ALBRIGHT, Administratrix of the Estate of CHARLES ALBRIGHT, Deceased, died on the seventeenth day of November, 1973. CHARLES M. ALBRIGHT, has been substituted as Administrator of the Estate of CHARLES ALBRIGHT, Deceased.

Respectfully submitted,

KENNETH W. BEHREND,
MARK B. ARONSON,
BEHREND AND ARONSON,
1502 Frick Building,
Pittsburgh, Pennsylvania 15219.

Motion for Substitution of Party and Amendment of Caption

AND NOW, come KENNETH W. BEHREND and MARK B. ARONSON and respectfully move that Your Honorable Court enter an Order substituting as Party Plaintiff, Petitioner, CHARLES M. ALBRIGHT, Administrator of the Estate of CHARLES ALBRIGHT, Deceased, and that the caption be amended as to the Plaintiff.

Respectfully submitted,

KENNETH W. BEHREND,
MARK B. ARONSON,
BEHREND AND ARONSON,
1502 Frick Building,
Pittsburgh, Pennsylvania 15219.

Order of Court

AND NOW THIS day of , 1974, it appearing that Suggestion of Death of MARY ALBRIGHT, Administratrix of the Estate of CHARLES ALBRIGHT, Deceased, as been filed of record in this Petition, and upon consideration of the foregoing Motion, it is hereby ORDERED, ADJUDGED, and DECREED that CHARLES M. ALBRIGHT, Administrator of the Estate of CHARLES ALBRIGHT, Deceased, be and he is hereby substituted of record as Party Plaintiff, and it is further ORDERED, ADJUDGED and DECREED that the caption be and it is hereby amended to read:

IN THE

SUPREME COURT OF THE UNITED STATES

Term, 197

CHARLES M. ALBRIGHT, Administrator of the Estate of CHARLES ALBRIGHT, Deceased,

Petitioner,

vs.

R. J. REYNOLDS TOBACCO COMPANY.

APPENDIX

Memorandum Order

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 72-2105.

MARY ALBRIGHT, Administratrix of the Estate of Charles Albright,

Appellant,

v.

R. J. REYNOLDS TOBACCO COMPANY, a corporation,

Appellee.

Present: VAN DUSEN, ADAMS and ROSENN,
Circuit Judges.

On October 23, 1972, the United States District Court for the Western District of Pennsylvania filed its opinion and order in the above matter, entering judgment for defendant for the reason stated in part I of its opinion (239a-252a) and also ordering (260a-261a) that the action be dismissed for lack of jurisdiction because "[w]e are convinced to a legal certainty that the evidentiary material submitted will not support a claim in excess of the jurisdictional minimum of $10,000. (citing cases)" for the reasons stated in part II of its opinion at 252a-261a.

Memorandum Order

On October 25, 1973, this Court affirmed the above-mentioned October 23, 1972 district court order, without specifically stating whether it was acting for the reasons stated in part I or part II of the district court opinion. On November 8, 1973, the plaintiff-appellant filed a petition for rehearing, contending that both part I and part II (see paragraphs 9-11) of the district court opinion and hence this Court's order of October 25, 1973, were in error. On November 23, 1973, this Court entered an order making clear that its October 25, 1973 order was based on the district court conclusion in part II of its opinion that the court had no jurisdiction over the action for failure to comply with the jurisdictional amount requirement of 28 U.S.C. 1332. This November 23, 1973 order provided:

> "After the word 'affirmed' on the second line of paragraph 2, the following language is to be added:
>
> > 'on the ground that appellant's claim fails to comply with the jurisdictional amount requirement of 28 U.S.C. § 1332.'"

The November 23rd order did not change or affect the dispositive portions of the October 25, 1973 order but, similar to an order changing the wording of an opinion, only clarified the reason for the Court's action. On November 30, 1973, this Court entered an order denying the plaintiff-appellant's November 8, 1973 petition for rehearing which had alleged error in part II of the district court opinion as stated above.

During the week of December 3, 1973, plaintiff-appellant sent to the Clerk of this Court a second petition for rehearing, contending that plaintiff's claim complied with the jurisdictional amount requirement of 28 U.S.C. 1332; this contention had also been raised, as stated above, in

paragraphs 9-11 of the first petition for rehearing filed November 8, 1973. Additional authorities in support of the position of plaintiff-appellant were cited in this second petition for rehearing.

Since the December, 1973 petition for rehearing was filed more than a month after the October 25, 1973 dispositive order of this Court and since the November 23, 1973 order merely specified the reason for the Court's action, the Clerk advised plaintiff-appellant that the Court, in accordance with its procedures, would consider the merits of plaintiff-appellant's second petition for rehearing only if the Court approved the filing of such petition. Such approval is necessary because the second petition was filed out of time. On December 8, 1973, plaintiff-appellant filed a petition for leave to file the December, 1973 petition for rehearing, alleging that it concerned the November 23, 1973 order of this Court. On December 18, 1973, this Court entered an order denying the motion to file the second petition for rehearing out of time.

On January 2, 1974, plaintiff-appellant sent a letter to the Chief Judge asserting that this Court was required to act upon the merits of his second petition for rehearing since it was filed within 14 days of this Court's above-mentioned November 23, 1973 order.

Treating the January 2, 1974 letter as a petition for reconsideration of the December 18, 1973 order of this Court denying the motion for leave to file a second petition for rehearing, it is denied.

BY THE COURT,
ARLIN M. ADAMS,
Circuit Judge.

Dated: January 18, 1974.

Judgment Order

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 72-2105.

MARY ALBRIGHT, Administratrix of the Estate of Charles Albright,

Appellant,

v.

R. J. REYNOLDS TOBACCO COMPANY, a corporation,

Appellee,

Appeal from the Order Entered on the 24th Day of October, 1972, of the United States District Court for the Western District of Pennsylvania at Civil Action No. 65-1155.

Submitted Under Third Circuit Rule 12(6)
August 8, 1973.

Before: VAN DUSEN, ADAMS and ROSEN,
Circuit Judges.

Kenneth W. Behrend, Mark B. Aronson, Behrend and Aronson, Pittsburgh, Pa. 15219, Attorneys for Appellant.

Harold R. Schmidt, Raymond G. Hasley, Rose, Schmidt and Dixon, Pittsburgh, Pa. 15222, Attorneys for Appellee.

Judgment Order

After a careful review of the briefs and record, it is,

ORDERED that the judgment of the district court be affirmed. See opinion of Honorable Gerald J. Weber, United States District Court for the Western District of Pennsylvania, dated October 23, 1972.

Each party is to pay its own costs.

BY THE COURT,
ARLIN M. ADAMS,
Circuit Judge.

Attest:
Thomas F. Quinn,
Clerk.

Certified as a true copy and issued in lieu of a formal mandate on December 13, 1973.

Test:

THOMAS F. QUINN,
Clerk, United States Court of Appeals for the Third Circuit.

Dated: October 25, 1973.

Order

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 72-2105.

MARY ALBRIGHT, Administratrix of the Estate of Charles Albright,

Appellant,

v.

R. J. REYNOLDS TOBACCO COMPANY, a corporation,

Appellee.

Appeal from the Order Entered on the 24th Day of October, 1972, of the United States District Court for the Western District of Pennsylvania at Civil Action No. 65-1155.

Submitted Under Third Circuit Rule 12(6)
August 8, 1973.

Before: VAN DUSEN, ADAMS and ROSEN,
Circuit Judges.

Kenneth W. Behrend, Mark B. Aronson, Behrend and Aronson, Pittsburgh, Pa. 15219, Attorneys for Appellant.
Harold R. Schmidt, Raymond G. Hasley, Rose, Schmidt and Dixon, Pittsburgh, Pa. 15222, Attorneys for Appellee.

Order

It is ORDERED that the judgment order filed October 25, 1973, be amended as follows:

After the word "affirmed" on the second line of paragraph 2, the following language is to be added:

> "on the ground that appellant's claim fails to comply with the jurisdictional amount requirement of 28 U.S.C. § 1332."

BY THE COURT,
ARLIN M. ADAMS,
Circuit Judge.

Attest:
Thomas F. Quinn,
Clerk.

Dated: Nov 23, 1973.

***Sur* Petition for Rehearing**

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 72-2105.

MARY ALBRIGHT, Administratrix of the Estate of Charles Albright,

Appellant,

v.

R. J. REYNOLDS TOBACCO COMPANY, a corporation,

Appellee.

Present: SEITZ, VAN DUSEN, ALDISERT,* ADAMS, ROSENN, HUNTER, WEIS and GARTH,

Circuit Judges.

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having

* Judge Aldisert did not participate in the decision.

asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *in banc*, the petition for rehearing is denied.

BY THE COURT,
ARLIN M. ADAMS,
Circuit Judge.

Dated: November 30, 1973.

Received & Filed:
Nov. 30, 1973.
Thomas F. Quinn,
Clerk.